

1 STEPHEN P. BERZON (#46540)  
sberzon@altshulerberzon.com  
2 LINDA LYE (#215584)  
llye@altshulerberzon.com  
3 CLAIRE P. PRESTEL (#235649)  
cprestel@altshulerberzon.com  
4 Altshuler Berzon LLP  
177 Post Street, Suite 300  
5 San Francisco, CA 94108  
Telephone: (415) 421-7151  
6 Facsimile: (415) 362-8064

7 ELIZABETH GINSBURG  
8 (Admitted to Practice *Pro Hac Vice*)  
9 elizabeth.ginsburg@alpa.org  
10 Air Line Pilots Association, International  
1525 Massachusetts Ave., NW  
Washington, D.C. 20036  
Telephone: (202) 797-4081  
Facsimile: (202) 797-4014

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

## SUMMARY OF ARGUMENT

The Court requested briefing on the scope of relief sought by Plaintiffs. This brief addresses only the relief sought in paragraphs 3 and 4 of Plaintiffs' Revised Proposed Preliminary Injunction. Plaintiffs have demonstrated an overwhelming likelihood of success on the merits of their claim that Defendant SkyWest Airlines, Inc. ("SkyWest") is interfering with its pilots' right to exercise free choice in the designation of their bargaining representative through its unlawful support for the SkyWest Airlines Pilot Association ("SAPA"). As a result, Plaintiffs are entitled to preliminary injunctive relief (1) prohibiting SkyWest from providing financial support to SAPA, (2) prohibiting SkyWest from providing discriminatory access to SAPA to communicate with SkyWest pilots, and (3) requiring SkyWest to provide members of Plaintiff SkyWest Pilots ALPA Organizing Committee ("OC") with access to the same channels of communication previously provided to SAPA. *See* Pltfs' Rev. Prop. Prel. Inj. at ¶¶3-4 (Doc. 128). The relief sought here is far more modest than the remedy ordinarily imposed by a long and unbroken line of company union cases, is squarely in line with precedent in "discriminatory access" cases, and is necessary to remedy the harmful effects of SkyWest's unlawful support for SAPA. Moreover, absent preliminary injunctive relief on these issues, employees' right to organize – free of the coercive effects of SkyWest's support for SAPA – will be irreparably lost.

17        This Court has jurisdiction to fashion a remedy under the Railway Labor Act (“RLA”) “as  
18 necessary to ensure the full effectiveness of the congressional purpose.” *Burke v. Compania Mexicana*  
19 *De Aviacion, S.A.*, 433 F.2d 1031, 1033 (9th Cir. 1970); *see also CSX Transp. Inc. v. Marquar*, 980  
20 F.2d 359, 367 (6th Cir.1992) (RLA creates “a general right of action that can be enforced with any  
21 appropriate remedy”). In addressing the scope of the remedy in this case, we therefore turn first to the  
22 nature and purpose of the RLA’s prohibition against carrier interference with employee free choice.

23 It is well-established that RLA Section 2, Third and Fourth broadly protects employee free  
24 choice, prohibits employer interference with that free choice, and specifically prohibits employer  
25 support for “company unions” as a particularly insidious form of unlawful employer interference. *See,*  
26 *e.g.*, *Virginian Ry. v. Sys. Fed. No. 40*, 300 U.S. 515, 543–44 (1937). Company unions have a  
27 prohibited coercive effect because, as they are intended to do, they create the *illusion* that employees  
28 are adequately represented and need not unionize in order to have their voices heard. *See, e.g.*, *NLRB*

1      *v. Penn. Greyhound Lines*, 303 U.S. 261, 271 (1938).

2            In cases involving company unions under the RLA and also the National Labor Relations Act,  
 3 which has a parallel prohibition, the Supreme Court and Ninth Circuit have repeatedly upheld the  
 4 extreme remedy of complete “disestablishment” of the company union. *See, e.g., Texas & N.O.R. v.*  
 5 *Bhd. of Ry. & Steamship Clerks*, 281 U.S. 548, 557 (1930); *Penn. Greyhound Lines*, 303 U.S. at 263-64;  
 6 *NLRB v. Holtville Ice & Cold Storage Co.*, 148 F.2d 168, 169-70 (9th Cir. 1945); *NLRB v. Idaho*  
 7 *Refining Co.*, 143 F.2d 246 (9th Cir. 1944).<sup>1</sup> In *NLRB v. Newport News Shipbuilding & Dry Dock Co.*,  
 8 308 U.S. 241 (1939), the Supreme Court affirmed a disestablishment order even in a case where a  
 9 “sweeping majority” of employees had voted for the company union, reasoning that disestablishment  
 10 of the union “previously dominated by the employer may be the only effective way of wiping the slate  
 11 clean and affording the employe[e]s an opportunity to start afresh in organizing for the adjustment of  
 12 their relations with the employer.” *Id.* at 250.

13           Paragraph 4 of Plaintiffs’ Revised Proposed Preliminary Injunction seeks an order prohibiting  
 14 SkyWest from funding SAPA. This is plainly commanded by Section 2, Fourth, which *expressly*  
 15 prohibits a carrier from using its funds to maintain, assist, or contribute to any labor representative. 45  
 16 U.S.C. §152, Fourth. A prohibition against funding is also much more modest than an order requiring  
 17 complete disestablishment of SAPA. It would have no impact on any existing agreements between  
 18 SAPA and SkyWest, and SAPA would be free to continue in existence. SAPA would simply have to  
 19 raise funds independent of SkyWest, as ordinary unions are required to do.

20           Plaintiffs are entitled to the relief sought in Paragraph 3. Employers are prohibited from  
 21 providing one union preferred access to the employer’s employees or premises. *See, e.g., Duane Reade,*  
 22 *Inc.*, 338 NLRB 943, 945 (2003); *Katz’s Deli*, 316 NLRB 318, 333 (1995); *Ella Indus., Inc.*, 295 NLRB  
 23 976, 979-80 (1989); *Castaways Management*, 285 NLRB 954, 959, 974 (1987). The appropriate  
 24 remedy for discriminatory access is injunctive relief prohibiting such discriminatory access and  
 25 requiring the employer to provide the excluded union *with the same access* previously granted to its

---

26  
 27           <sup>1</sup> “Disestablishment” entails a complete prohibition against current and future dealings  
 28 between the employer and the company union. Thus, a disestablishment order may prohibit the  
 entity appearing on the ballot in a future representation election. *NLRB v. Falk*, 308 U.S. 453, 461  
 (1940).

1 preferred union. *See, e.g., San Manuel Indian Bingo and Casino*, 345 NLRB No. 79, Order at ¶¶1a, 2a  
 2 (2005); *Kosher Plaza Supermarket*, 313 NLRB 74, Order at ¶¶1d, 2(e) (1993). As the D.C. Circuit has  
 3 explained, “access may be imposed as a remedial measure without a finding that the union will be  
 4 unable to reach employees through other available channels of communications. Instead, the critical  
 5 inquiry is whether the employer conduct is of such a nature that access is needed to offset harmful  
 6 effects that have been produced by that conduct.” *United Steelworkers of America v. NLRB*, 646 F.2d  
 7 616, 638 (D.C. Cir. 1981).<sup>2</sup>

8 The remedy sought – injunctive relief prohibiting SkyWest from providing discriminatory access  
 9 and requiring SkyWest to provide Plaintiffs access to the same channels previously provided to SAPA  
 10 – is well within the main of relief ordered in cases involving unequal access. *See, e.g., San Manuel*  
 11 *Indian Bingo and Casino*, 345 NLRB No. 79, Order at ¶¶1a, 2a; *Kosher Plaza Supermarket*, 313 NLRB  
 12 74, Order at ¶¶1d, 2(e). Indeed, it is far more modest than the remedy of “disestablishment” often  
 13 imposed in cases such as this involving company unions. And requiring SkyWest to provide members  
 14 of Plaintiff OC with access to company email and newly hired pilot classes is “the only effective way  
 15 of wiping the slate clean and affording the employe[e]s an opportunity to start afresh in organizing for  
 16 the adjustment of their relations with the employer.” *Newport News*, 308 U.S. at 250.

17 Finally, the relief Plaintiffs seek in Paragraphs 3 and 4 – which address the destructive effects

---

19           <sup>2</sup> Defendant’s contention that SAPA does not use its preferred access to engage in  
 20 “campaign” activity is both inaccurate and irrelevant. First, the prohibition against discriminatory  
 21 access applies even when the union with preferred access is engaging in speech related to its so-  
 22 called “representational” duties, rather than an explicit campaign. *Katz’s Deli*, 316 NLRB at 324,  
 23 333. Second, as a factual matter, SAPA does use its preferred access to “campaign.” Third, and  
 24 most fundamentally, if it were true that SAPA engages in little overt campaigning, that would only  
 25 underscore the need for the remedy sought by Plaintiffs. SAPA does not need to campaign as such  
 26 because SkyWest has unlawfully “recognized” it without ever requiring SAPA to show majority  
 27 support. *See, e.g., NLRB v. Link-Belt Co.* 311 U.S. 584, 598 (1941); *NLRB v. Katz’s Delicatessen*,  
 28 80 F.3d 755, 767 (2d Cir. 1996). That is the whole point of a company union. To permit SkyWest  
 to continue to provide discriminatory access to SAPA would allow SkyWest to profit from its own  
 unlawful conduct in “recognizing” SAPA and thereby obviating the need for SAPA to “campaign,”  
 as representative unions are required to do. Equally to the point, SkyWest’s support of SAPA is by  
 its nature campaign activity against independent union representation because it allows SkyWest to  
 create “the mistaken belief that [SAPA] was truly representative and afforded an agency for  
 collective bargaining” in order “to prevent self-organization” by the SkyWest pilot group. *Penn.*  
*Greyhound*, 303 U.S. at 271.

1 of SkyWest's support for SAPA – must be granted as part of the preliminary injunction, or the RLA-  
2 protected right of SkyWest pilots to exercise free choice, without employer interference, will be forever,  
3 irreparably lost. Congress and the Courts have long recognized that employer support for company  
4 unions is inherently coercive of employee free choice. Absent the relief in these paragraphs, SkyWest's  
5 coercive and unlawful support of SAPA would be left completely, irreparably unremedied pending a  
6 final judgment. *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 938 (9th Cir. 1987) ("coercive  
7 and inhibitory effects upon the employees' organizational rights secured by the RLA" are "irreparable");  
8 *Brown v. Pac. Tel. & Telegraph Co.*, 218 F.2d 542, 544 (9th Cir. 1955) ("drifting away" of supporters  
9 from union "to the union favored by the employers" constitutes irreparable harm). Nor does the  
10 National Mediation Board's authority to administer an election negate the irreparability of Plaintiffs'  
11 harm. The NMB has *no authority* to adjudicate violations of the Act. *Horizon Air Indus. v. NMB*, 232  
12 F3d 1126, 1133 (9th Cir. 2000). The NMB may supervise elections, but it cannot even investigate a  
13 claim of unlawful employer interference until *after* the election is conducted (absent undefined  
14 "extraordinary circumstances), and the irreparable harm to Plaintiffs' right to organize has *already* been  
15 inflicted. See NMB Rep. Manual §17.0 at 24 (2005).

16

17

18

19

20

21

22

23

24

25

26

27

28

## TABLE OF CONTENTS

1	TABLE OF AUTHORITIES .....	v
2	INTRODUCTION .....	1
3	ARGUMENT .....	1
4	I.    PLAINTIFFS HAVE AN OVERWHELMING LIKELIHOOD OF SUCCESS 5          IN DEMONSTRATING THAT SKYWEST'S UNLAWFUL SUPPORT FOR 6          SAPA VIOLATES THE RLA .....	1
7	A.    SKYWEST'S SUPPORT FOR SAPA VIOLATES THE RLA 8          REGARDLESS OF WHETHER SAPA USES ITS FAVORED 9          ACCESS TO "CAMPAIGN." .....	3
10	B.    THE EVIDENCE ESTABLISHES PLAINTIFFS' OVERWHELMING 11          LIKELIHOOD OF SUCCESS ON THEIR CLAIM THAT 12          SKYWEST'S SUPPORT FOR SAPA IS ILLEGAL .....	5
13	II.    PLAINTIFFS' PROPOSED RELIEF REMEDIES THE HARMFUL EFFECTS 14          OF DEFENDANT'S UNLAWFUL SUPPORT OF SAPA .....	9
15	A.    THE SUPREME COURT HAS UPHELD THE EXTREME REMEDY 16          OF DISESTABLISHMENT AS NECESSARY AND APPROPRIATE 17          TO REMEDY THE UNIQUELY HARMFUL EFFECTS OF 18          COMPANY UNIONISM .....	10
19	B.    THE RELIEF SOUGHT BY PLAINTIFFS IN PARAGRAPHS 3 AND 20          4 IS NECESSARY TO REMEDY THE HARMFUL EFEFCTS OF 21          SKYWEST'S UNLAWFUL CONDUCT AND FAR MORE 22          MODEST THAN THE REMEDY OF DISESTABLISHMENT .....	11
23	1.    AN ORDER PROHIBITING SKYWEST FROM FUNDING 24            SAPA IS COMMANDED BY SECTION 2, FOURTH .....	11
25	2.    SKLYWEST'S UNLAWFUL PROVISION OF 26            DISCRIMINATORY ACCESS TO SAPA REQUIRES AN 27            ORDER PROHIBITING FUTURE DISCRIMINATION 28            AND REQUIRING EQUAL ACCESS .....	12
29	III.    ABSENT PRELIMINARY INJUNCTIVE RELIEF, PLAINTIFFS' RIGHT 30          TO BE FREE OF THE COERCIVE EFFECTS OF SKYWEST'S SUPPORT 31          FOR SAPA WILL BE IRREPARABLY LOST .....	15
32	CONCLUSION .....	17

## TABLE OF AUTHORITIES

CASES

3	<i>Adams v. Fed. Ex. Corp.</i> , 470 F.Supp. 1356 (W.D. Tenn. 1979) . . . . .	2
5	<i>Am. Bakery Workers Int'l Union v. NLRB</i> , 379 F.2d 160 (D.C. Cir. 1967) . . . . .	6, 7
6	<i>Arcamuzi v. Continental Air Lines, Inc.</i> , 819 F.2d 935 (9th Cir. 1987) . . . . .	9, 16
7	<i>Ass'n of Flight Attendants v. Horizon Air Indus.</i> , 280 F.3d 901 (9th Cir. 2002) . . . . .	11
8	<i>Barthelemy v. ALPA</i> , 897 F.2d 999 (9th Cir. 1990) . . . . .	9
9	<i>Brown v. Pac. Tel. &amp; Telegraph Co.</i> , 218 F.2d 542 (9th Cir. 1955) . . . . .	16
10	<i>Burke v. Compania Mexicana De Aviacion, S.A.</i> , 433 F.2d 1031 (9th Cir. 1970) . . . . .	1
11	<i>CSX Transp. Inc. v. Marquar</i> , 980 F.2d 359 (6th Cir. 1992) . . . . .	1
12	<i>Caldor Inc.</i> , 319 NLRB 728 (1995) . . . . .	8
13	<i>Castaways Management</i> , 285 NLRB 954 (1987) . . . . .	12, 15
14	<i>Delta Air Lines, Inc.</i> , 30 NMB 102 (2002) . . . . .	2, 17
15	<i>Dennison Mfg. Co.</i> , 168 NLRB 1012 (1967), <i>enf'd</i> , 419 F.2d 1080 (1st Cir. 1969) . . . . .	6, 7, 8
16	<i>Duane Reade, Inc.</i> , 338 NLRB 943 (2003) . . . . .	7, 12, 15
17	<i>Ella Indus., Inc.</i> , 295 NLRB 976 (1989) . . . . .	12, 15
18	<i>Elrod v. Burns</i> , 427 U.S. 347 (1976) . . . . .	16
19	<i>Fieldcrest Cannon, Inc. v. NLRB</i> , 97 F.3d 65 (4th Cir. 1996) . . . . .	13
20	<i>Green v. County School Bd. of New Kent</i> , 391 U.S. 430 (1968) . . . . .	15

1	<i>Hertzka &amp; Knowles v. NLRB,</i> 2 503 F.2d 625 (9th Cir. 1974) .....	9
3	<i>Horizon Air Indus. v. NMB,</i> 4 232 F3d 1126 (9th Cir. 2000) .....	17
5	<i>Katz's Deli,</i> 6 316 NLRB 318 (1995) .....	12, 14, 15
7	<i>Konop v. Hawaiian Airlines, Inc.,</i> 8 302 F.3d 868 (9th Cir. 2002) .....	<i>passim</i>
9	<i>Kosher Plaza Supermarket,</i> 10 313 NLRB 74 (1993) .....	13, 15
11	<i>Lawson Co. v. NLRB,</i> 12 753 F.2d 471 (6th Cir. 1985) .....	4, 5, 7
13	<i>NLRB v. Brown Paper Mill Co.,</i> 14 108 F.2d 867 (5th Cir. 1940) .....	6
15	<i>NLRB v. Falk Corp.,</i> 16 308 U.S. 453 (1940) .....	<i>passim</i>
17	<i>NLRB v. H&amp;H Plastics Mfg.,</i> 18 389 F.2d 678 (6th Cir. 1968) .....	6, 7
19	<i>NLRB v. Holtville Ice &amp; Cold Storage Co.,</i> 20 148 F.2d 168 (9th Cir. 1945) .....	4, 10
21	<i>NLRB v. Idaho Refining Co.,</i> 22 143 F.2d 246 (9th Cir. 1944) .....	4, 10, 11
23	<i>NLRB v. Katz's Delicatessen,</i> 24 80 F.3d 755 (2d Cir. 1996) .....	5
25	<i>NLRB v. Koehler,</i> 26 328 F.2d 770 (7th Cir. 1964) .....	6, 7
27	<i>NLRB v. Link-Belt Co.,</i> 28 311 U.S. 584 (1941) .....	7, 8
29	<i>NLRB v. Midwestern Personnel Servs., Inc.,</i> 30 322 F.3d 969 (7th Cir. 2003) .....	4, 9
31	<i>NLRB v. Newport News Shipbuilding &amp; Dry Dock Co.,</i> 32 308 U.S. 241 (1939) .....	<i>passim</i>
33	<i>NLRB v. Pennsylvania Greyhound Lines,</i> 34 303 U.S. 261 (1938) .....	<i>passim</i>
35	<i>NLRB v. S.E. Nichols, Inc.,</i> 36 862 F.2d 952 (2d Cir. 1988) .....	13

1	<i>NLRB v. Vernitron Elec. Components, Inc.</i> , 548 F.2d 24 (1st Cir. 1977) .....	4, 7
2	<i>Patsy v. Bd. of Regents</i> , 457 U.S. 496 (1982) .....	17
4	<i>Powers Regulator Co. v. NLRB</i> , 355 F.2d 506 (7th Cir. 1966) .....	7
5	<i>Regal Recycling</i> , 329 NLRB 355 (1999) .....	13
7	<i>San Manuel Indian Bingo and Casino</i> , 345 NLRB No. 79 (2005) .....	12, 15
8	<i>Scott ex rel. NLRB v. Stephen Dunn &amp; Assocs.</i> , 241 F.3d 652 (9th Cir. 2001) .....	16
10	<i>Simmons Indus., Inc.</i> , 321 NLRB 228 (1996) .....	13
11	<i>Texas &amp; N.O.R. Co. v. Bhd. of Ry. &amp; Steamship Clerks</i> , 281 U.S. 548 (1930) .....	<i>passim</i>
13	<i>United Steelworkers of America v. NLRB</i> , 646 F.2d 616 (D.C. Cir. 1981) .....	13, 15
14	<i>Utrad Corp. v. NLRB</i> , 454 F.2d 520 (7th Cir. 1972) .....	<i>passim</i>
16	<i>V&amp;S ProGalv, Inc.</i> , 323 NLRB 801 (1997), <i>enf'd</i> , 168 F.3d 270 (6th Cir. 1999) .....	4
17	<i>Virginian Ry. v. Sys. Fed. No. 40</i> , 300 U.S. 515 (1937) .....	<i>passim</i>

#### STATUTES AND REGULATIONS

20	42 U.S.C. §1983 .....	17
21	45 U.S.C. §152 .....	<i>passim</i>
22	29 U.S.C. §158(a)(2) .....	4, 6
23	H.R. Rep. No. 73-1944 (1934) .....	2
24	H.R. Rep. No. 74-1147 (1935) .....	3, 4
25	S. Rep. No. 73-1065 (1934) .....	2
26	S. Rep. No. 74-573 (1934) .....	3

## MISCELLANEOUS

2	ABA, <u>The Railway Labor Act</u> Ch. 5.III.A. (2d ed. 2005) .....	2
3	NMB Rep. Manual §17.0 (2005) .....	17

## INTRODUCTION

Plaintiffs have demonstrated an overwhelming likelihood of success on the merits of their claim that Defendant SkyWest Airlines, Inc. (“SkyWest”) has interfered with the right of its pilots to exercise free choice in the designation of their bargaining representative by providing unlawful assistance to the SkyWest Airlines Pilot Association (“SAPA”). As a result, Plaintiffs are entitled to preliminary injunctive relief (1) prohibiting SkyWest from providing financial support for SAPA, (2) prohibiting SkyWest from providing discriminatory access to SAPA to communicate with SkyWest pilots, and (3) requiring SkyWest to provide members of Plaintiff SkyWest Pilots ALPA Organizing Committee (“OC”) with access to the same channels of communication previously provided to SAPA. Pltfs’ Rev. Prop. Prel. Inj. at ¶¶3-4. (Doc. 128.) The relief sought here is far more modest than the remedy ordinarily imposed and required in company union cases such as this, is squarely in line with precedent in “discriminatory access” cases, and is necessary to remedy the harmful effects of SkyWest’s unlawful support for SAPA.

14        This Court has jurisdiction to fashion a remedy under the Railway Labor Act “as necessary to  
15 ensure the full effectiveness of the congressional purpose.” *Burke v. Compania Mexicana De Aviacion,*  
16 *S.A.*, 433 F.2d 1031, 1033 (9th Cir. 1970); *see also CSX Transp. Inc. v. Marquar*, 980 F.2d 359, 367  
17 (6th Cir. 1992) (RLA rights “can be enforced with any appropriate remedy”). Accordingly, we turn first  
18 to the nature and purpose of the RLA’s prohibition against employer interference with employee free  
19 choice in general and company unions in particular, and then explain why the scope of the remedy  
20 sought here is plainly appropriate in light of the harm to employee free choice caused by SkyWest’s  
21 support for SAPA. Finally, we address why the relief sought must be granted at the preliminary  
22 injunction stage and cannot await a final decision on the merits.

## ARGUMENT

24 I. PLAINTIFFS HAVE DEMONSTRATED AN OVERWHELMING LIKELIHOOD OF  
25 SUCCESS ON THE MERITS OF THEIR CLAIMS THAT SKYWEST'S SUPPORT  
FOR SAPA VIOLATES THE RLA.

26 RLA Section 2, Third prohibits any carrier “interference” or “influence” over the choice of  
27 employees’ bargaining representative. 45 U.S.C. §152, Third. RLA Section 2,Fourth prohibits any use  
28 of carrier “funds . . . in maintaining or assisting or contributing” to any union or bargaining

1 representative. 45 U.S.C. §152, Fourth. These statutory provisions generally prohibit “employers from  
 2 providing assistance to a union or labor faction” and from “assist[ing] one union faction over another.”  
 3 *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 885 (9th Cir. 2002).<sup>3</sup>

4 Employee free choice in the designation of a collective bargaining representative is “essential”  
 5 to the RLA’s entire statutory scheme, and Congress enacted RLA Section 2, Third and Fourth for the  
 6 express purpose of preserving that free choice by prohibiting company-funded and company-supported  
 7 unions. *See, e.g., Virginian Ry. v. Sys. Fed. No. 40*, 300 U.S. 515, 543–44 (1937) (affirming injunctive  
 8 relief prohibiting further assistance to company-supported union); *Texas & N.O.R. Co. v. Bhd. of Ry.*  
 9 & *Steamship Clerks*, 281 U.S. 548, 557–60, 569 (1930) (affirming injunctive relief requiring  
 10 disestablishment of company-supported union). Congress emphasized in enacting these RLA  
 11 provisions that they prohibit “any carrier from providing financial assistance to any union of employees  
 12 from funds of the carrier” and forbid “the use of the carriers’ funds to maintain, aid, or control” unions.  
 13 S. Rep. No. 73-1065, at 2 (1934); H.R. Rep. No. 73-1944, at 2 (1934), attached as Exhs. 2–3 to Prestel  
 14

15  
 16       <sup>3</sup> It cannot be doubted that the Court has jurisdiction over plaintiffs’ SAPA-related claims.  
 17 The Ninth Circuit exercised jurisdiction over the plaintiff’s RLA unlawful-assistance claim in  
 18 *Konop*, and the Supreme Court, Ninth Circuit, and other appellate courts have repeatedly exercised  
 19 jurisdiction over claims for violation of RLA Section 2, Third and Fourth during organizing  
 20 campaigns. *See Plfs.’ Corrected Reply ISO Mot. for Prelim. Inj.* at 15–20 (citing cases). The  
 21 leading treatise – which lists SkyWest’s counsel, Douglas Hall, as a Senior Editor – confirms that  
 22 “courts generally have exercised jurisdiction over actions brought against carriers for interference  
 23 with employees’ rights under RLA Sections 2, Third and Fourth, during union organizing drives.”  
 24 ABA, *The Railway Labor Act Ch. 5.III.A.*, at 257 (2d ed. 2005) (Prestel Decl. Exh. 1). Even the  
 25 *Delta Air Lines* case cited and distributed by SkyWest during the evidentiary hearing confirms that  
 in the organizing campaign in that case, the union “could have sought the judicial relief available  
 under [RLA] Section [2,] Third and Fourth.” *Delta Air Lines, Inc.*, 30 NMB 102, 114 (2002).  
 Plaintiffs also do not seek relief that the NMB could provide during this organizing phase; nor does  
 Plaintiffs’ requested relief invade the NMB’s exclusive authority to conduct elections and to certify  
 collective bargaining representatives. *See* Corrected Reply at 14–20.

26 Plaintiffs note that in the “Summary of Argument” of their Corrected Reply, a parenthetical  
 27 mistakenly describes a Western District of Tennessee case as having granted “preliminary”  
 28 injunctive relief on RLA Section 2, Third and Fourth claims. *See* Corrected Reply at i (citing  
*Adams v. Fed. Ex. Corp.*, 470 F.Supp. 1356, 1374 (W.D. Tenn. 1979)). In fact, the court in that case  
 granted *permanent* injunctive relief, including relief based on a claim that the employer violated the  
 RLA by interfering with employees’ right to wear union insignia. *Adams*, 470 F.Supp. at 1371–72.

1 Decl.<sup>4</sup>

2       **A. SKYWEST'S SUPPORT FOR SAPA VIOLATES THE RLA REGARDLESS OF**  
   **WHETHER SAPA USES ITS FAVORED ACCESS TO "CAMPAIGN."**

3       The Supreme Court recognized 70 years ago that company-supported unions inherently interfere  
   4 with employees' right to freely choose their bargaining representative. *See, e.g., Virginian Ry.*, 300 U.S.  
   5 at 543–44 (carrier support for company union is “coercive interference”). Company unions are  
   6 inherently coercive because, as they are intended to do, they create the *illusion* that employees are  
   7 adequately represented and need not unionize to be heard. *See, e.g., NLRB v. Penn. Greyhound Lines*,  
   8 303 U.S. 261, 271 (1938).

9       Although SkyWest contends that its provision of special access to SAPA is permissible because  
   10 SAPA does not use that access to “campaign,” the illusion of adequate representation is created not only  
   11 when an employer grants a company union access for campaign purposes, but also when the employer  
   12 “bargains with” (or appears to) with its preferred “union.” In fact, the most insidious effect of company  
   13 unions results from employers’ apparent willingness to bargain with them. Such conduct enables “the  
   14 employer to induce adherence of employees to the [company union] in the mistaken belief that it was  
   15 truly representative and afforded an agency for collective bargaining” – thereby preventing “self-  
   16 organization.” *Id.*

17       Company unions – and employers’ willingness to bargain with them – are “convenient  
   18 weapon[s]” in employers’ anti-union campaigns, even if the company unions themselves do not  
   19 expressly campaign for majority support or against independent unions. *See NLRB v. Falk Corp.*, 308  
   20 U.S. 45, 460 (1940) (company-supported union was “convenient weapon to prevent the exercise of its  
   21 employees’ rights to self-organization”). Thus, courts routinely hold that an employer’s bargaining with  
   22 and granting concessions to a company-supported union is persuasive evidence of unlawful employer

---

24       <sup>4</sup> *See also* H.R. Rep. No. 74-1147, at 3067 (1935) (report on similar anti-interference  
   25 provision in the National Labor Relations Act: “Collective bargaining is reduced to a sham when the  
   26 employer sits on both sides of the table by supporting a particular organization with which he deals,  
   27 by the payment of added compensation to their representatives, or by permitting such  
   28 representatives to conduct organizational work among the employees during working hours without  
     deduction of pay”); S. Rep. No. 74-573, at 2310 (1935) (“It seems clear that an organization or a  
     representative or agent paid by the employer for representing employees cannot command, even if  
     deserving it, the full confidence of such employees.”) (Prestel Decl. Exhs. 4, 5).

1 assistance – regardless of whether the company union is also granted preferential access to employer  
 2 facilities for campaign purposes. *See, e.g., NLRB v. Holtville Ice & Cold Storage Co.*, 148 F.2d 168,  
 3 169, 170 (9th Cir. 1945) (employer signed collective bargaining agreement “without requesting a  
 4 showing that the Association represented a majority”); *NLRB v. Idaho Refining Co.*, 143 F.2d 246 (9th  
 5 Cir. 1944) (employer agreed to collective-bargaining agreement “without ascertaining whether or not  
 6 the Association represented a majority”).<sup>5</sup> Congress, the Supreme Court, and Ninth Circuit view the  
 7 prohibitions in the RLA and NLRA against “company unions” as parallel. Thus, cases under the two  
 8 statutes on this issue are interchangeable. *Penn. Greyhound*, 303 U.S. at 266–68 (looking to RLA in  
 9 NLRA company union case); *Konop*, 302 F.3d at 885 (looking to NLRA in RLA company union case);  
 10 *see also* H.R. Rep. No. 1147, at 3066 (describing NLRA Section 8(a)(2) as having “its counterpart in  
 11 . . . [RLA] section 2”).

12 Indeed, employers’ unlawful assistance often makes it *unnecessary* for company unions like  
 13 SAPA to “campaign” for employee support. An employer’s decision to recognize a company-supported  
 14 union may preempt the need to gather support. *See, e.g., Penn. Greyhound*, 303 U.S. at 267 (“[O]nce  
 15 an employer has conferred recognition on a particular organization it has a marked advantage over any  
 16 other in securing the adherence of employees . . .”); *NLRB v. Vernitron Elec. Components, Inc.*, 548  
 17 F.2d 24, 26 (1st Cir. 1977) (employer’s “speedy recognition” of union “‘locked in’ majority support  
 18 which otherwise might have eroded” after employer assistance ended). In more extreme cases (like this  
 19 one), company unions need not campaign because employees are forced to join them and because  
 20 employers recognize and bargain with them without requiring any evidence of majority support. *See,*  
 21 *e.g.*, 6/7/07 Tr. (Doc. No. 134) 29:7–30:16, 124:7–25, 127:6–8, 224:20–225:1; 6/8/07 Tr. (Prestel Decl.  
 22 Exh. 6) 81:17–21; Defs.’ Exh. 6.

23  
 24 \_\_\_\_\_  
 25 <sup>5</sup> *See also NLRB v. Midwestern Personnel Servs., Inc.*, 322 F.3d 969, 977–78 (7th Cir. 2003)  
 26 (employer entered into agreement with preferred union without first determining whether that union  
 27 enjoyed majority employee support); *Lawson Co. v. NLRB*, 753 F.2d 471, 477–78 (6th Cir. 1985)  
 28 (employee committee’s “recommendation . . . were quickly adopted by the Company”); *Utrad Corp.  
 v. NLRB*, 454 F.2d 520, 523 (7th Cir. 1972) (“fruitful bargaining sessions” between employer and  
 employee association); *V&S ProGalv, Inc.*, 323 NLRB 801, 806 (1997) (“give and take” between  
 employer and company union), *enf’d*, 168 F.3d 270 (6th Cir. 1999).

When employees are forced to become members of a company union, and when a carrier preemptively recognizes that union without evidence of employee support, the lack of a company union “campaign” does not undermine plaintiffs’ claims of unlawful employer assistance. To the contrary, the carrier’s conduct in recognizing and bargaining with a union that has not been voluntarily selected by a majority of employees is *itself* illegal. *See, e.g., NLRB v. Katz’s Delicatessen*, 80 F.3d 755, 767 (2d Cir. 1996) (unlawful “for an employer to recognize and enter a collective bargaining agreement with a union that has not been selected by a majority of the employees”); 45 U.S.C. §152, Fourth (representatives shall be chosen by a “majority” of employees). Holding in this situation that SAPA’s lack of campaign activity undermines plaintiffs’ claims would turn the statutory scheme on its head: It would *reward* SkyWest for its unlawful conduct in illegally recognizing and bargaining with the company union, and thereby making it unnecessary for SAPA to campaign for employee support.

**B. THE EVIDENCE ESTABLISHES PLAINTIFFS’ OVERWHELMING LIKELIHOOD OF SUCCESS ON THEIR CLAIM THAT SKYWEST’S SUPPORT FOR SAPA IS ILLEGAL.**

Evidence introduced during the preliminary injunction hearing establishes each of the following facts, which courts have considered persuasive evidence of unlawful employer assistance:

- (1) All SkyWest pilots are required to become SAPA members, and there is no procedure for rejecting membership. *Compare Penn. Greyhound*, 303 U.S. at 269 (all employees “automatically became members of the Association”); *Virginian Ry.*, 300 U.S. at 540 (employer “sought to induce its employees to join” company union) *with 6/7/07 Tr. 224:20–225:1; 6/8/07 Tr. 81:17–21; Defs.’ Exh. 6.*
- (2) SkyWest recognized SAPA as its employees’ exclusive representative without requiring any showing of majority support. *Compare NLRB v. Link-Belt Co.*, 311 U.S. 584, 598 (1941) (employer’s “quick recognition” of company union); cases cited *supra* p.4 & n.5 *6/7/07 with 6/7/07 Tr. 29:7–30:16, 124:7–25, 127:6–8.*
- (3) SkyWest changed SAPA’s organizational structure for the express purpose of defeating independent union campaigns. *Compare Texas & N.O.R.*, 281 U.S. at 559 (employer’s motive is relevant to proving unlawful interference); *Utrad*, 454 F.2d at 523 (employee association “revitaliz[ed] . . . contemporaneously with” union campaign); *Lawson Co.*, 753 F.2d at 477 (employee committee formed in response to union organizing campaign) *with 6/7/07 230:6–15; 6/8/07 Tr. 122:13–123:11.*
- (4) SkyWest pays SAPA representatives more for their SAPA-related work than regular line pilots earn, even in cases where those employees are no longer able to fly the line. *Compare NLRB v. Newport News Shipbuilding*, 308 U.S. 241, 244 (1939) (employer paid employee representatives for their union work); *Texas & N.O.R.*, 281 U.S. at 560 (company union

members “were permitted to devote their time to that enterprise without deduction from their pay”) with 6/7/07 Tr. 125:9–12, 226:16–227:2, 248:2–249:6.<sup>6</sup>

(5) SkyWest pays *all* of SAPA’s expenses, and SAPA does not collect membership dues or have a treasurer. SAPA has no budget, no bank account, and no right to money without the company’s permission. *Compare Penn. Greyhound*, 303 U.S. at 269 (company paid union’s expenses and union did not collect dues); *Virginian Ry.*, 300 U.S. at 539 (“all [employee] Association expenses were paid” by the carrier); *Texas & N.O.R. Co.*, 281 U.S. at 560 (employer paid all of company union’s expenses) with 6/7/07 Tr. 125:3–8, 225:5–15, 230:16–231:12, 236:10–20; 6/8/07 Tr. 11:19–21, 81:25–82:2, 83:24–85:15.<sup>7</sup>

(6) SkyWest provides SAPA with additional assistance, including access to group email (for campaign purposes and for distribution of SAPA meeting summaries), pilot v-files (or mailboxes), newly hired pilot classes, general bulletin boards, and dedicated bulletin boards – while denying this same access to ALPA. *Compare Utrad*, 454 F.2d at 521 (union permitted to use “Company time, bulletin boards and mimeograph services”); *NLRB v. H&H Plastics Mfg.*, 389 F.2d 678, 681 (6th Cir. 1968) (minutes of employee committee meetings were distributed on company bulletin boards); *Am. Bakery Workers*, 379 F.2d at 163 (employee association was permitted “to hold its meeting on Company property, during working hours” and company “paid employees for the time so spent”) with 6/7/07 Tr. 26:11–27:15, 27:19–28:20; Plfs.’ Exhs. 6–9; Martirano Decl. Exh 1.<sup>8</sup>

---

<sup>6</sup> See also *Am. Bakery Workers Int’l Union v. NLRB*, 379 F.2d 160, 163 (D.C. Cir. 1967) (company “paid employees for the time . . . spent” on company union business).

Defendant introduced at the preliminary injunction hearing excerpts of collective bargaining agreements to which ALPA is a party. Def. Exhs. 11, 13, 15. Those agreements provide for flight pay loss, which is expressly permitted by the proviso to Section 2, Fourth, 45 U.S.C. §152, Fourth, and, unlike the present case, they are part of a binding and enforceable collective bargaining agreement negotiated at arms’ length by financially independent parties. The financial support for union time cannot be manipulated to influence the Association and cannot be revoked at the company’s whim or based on company disapproval of ALPA actions. By contrast, the evidence before the Court shows SAPA has no expenses that are not funded by the Company, *see, e.g.*, 6/8/07 Tr. at 11, and that the three full-time Executive Board members of SAPA, who receive pay equivalent to 104 hours per month, earn *more* than they would if they “flew the line.” *Id.* at 18–19.

<sup>7</sup> See also *Utrad*, 454 F.2d at 521 (company union received “vending-machine profits . . . as its sole source of financial support); *NLRB v. Koehler*, 328 F.2d 770, 771 (7th Cir. 1964) (company union received “proceeds from the coke vending machine on [employer’s] premises”); *NLRB v. Brown Paper Mill Co.*, 108 F.2d 867, 870 n.5 (5th Cir. 1940) (dues collected by company union “were so insignificant and their collection so little enforced as to show on its face that the ‘association’ was not self-constituted and independent”); *Dennison Mfg. Co.*, 168 NLRB 1012 (1967) (“financial contribution” of \$4000 per month to employee committee violated NLRA Section 8(a)(2); the “Committee has no funds, has no source of income, and looks to the [employer] as its sole source of finances”), *enf’d*, 419 F.2d 1080 (1st Cir. 1969).

<sup>8</sup> See also *Koehler*, 328 F.2d at 771 (company union received “free use of [employer’s] office facilities”); *Brown Paper Mill*, 108 F.2d at 870 (company union permitted to meet on employer’s property while independent union’s attempts to meet subject to employer surveillance); (continued...)

1 (7) SkyWest “put[s] [SAPA] forward as the authorized representative” of its employees, *Virginian*  
2 Ry., 300 U.S. at 540, by permitting SAPA to address mandatory new-hire training classes.  
3 *Compare Vernitron Elec.*, 548 F.2d at 26 (employer “shepherd[ed]” employees to meeting with  
4 preferred union, which would “create in the employee’s minds an impression of employer  
support for the union” – especially when employer paid employees for time spent in meeting);  
5 *Duane Reade Inc.*, 338 NLRB 943, 943 (2003) (employees required to meet with company  
supported union) *with* 6/7/07 Tr. 29:10–30:16, 71:2–16, 75:1–16, 200:11–201:6; 6/8/07 Tr.  
6 86:5–87:8.

7 (8) SAPA does not retain independent counsel or an outside auditor. *Compare Koehler*, 328 F.2d  
8 at 771 (company union received legal advice from employer’s attorney); *H&H Plastics Mfg.*,  
9 389 F.2d at 681 (“[i]nasmuch as the employee representatives were admittedly inexperienced  
10 . . . , management was available to and did provide valuable assistance and guidance”) *with*  
11 6/7/07 Tr. 131:23–132:6, 242:25–243:8; 6/8/07 Tr. 85:21–86:4.

12 (9) SkyWest permits employees to wear SAPA insignia while prohibiting other union insignia.  
13 *Compare Am. Bakery Workers*, 379 F.2d at 163 (company permitted employees to wear  
14 company-union “badges”) *with* 6/7/07 Tr. 26:11–27:15, 31:23–32:5, 45:21–46:2, 50:16–53:10,  
15 150:6–154:13, 164:6–169:5, 182:8–184:25, 188:16–22, 242:8–13; 6/8/07 Tr. 87:19–24; Plfs.’  
Exh. 5

16 (10) SAPA’s secretary no longer works as a pilot, cannot fly the line, does not even qualify as an  
17 employee member of SAPA, and is classified by SkyWest as a member of management.  
18 *Compare Newport News*, 308 U.S. at 245 (management representative served on employee  
committee); *Utrad*, 454 F.2d at 521 (supervisors included in company union); *Powers Regulator*  
19 Co. v. NLRB, 355 F.2d 506, 508 (7th Cir. 1966) (employees’ “negotiating committee” included  
20 supervisor) *with* 6/7/07 Tr. 226:16–228:23; 6/8/07 Tr. 6:16–19, 70:23–71:2, 71:13–73:8,  
21 73:14–74:4; Plfs.’ Exh. 16; Defs.’ Exh. 6.

22 (11) SAPA’s secretary (and member of management) reports on his work to management, acts as  
23 SAPA’s “administrative head” in direct contravention of the bylaws (which he drafted), and  
fulfills other functions that the bylaws assign to SAPA’s president. *Compare Texas & N.O.R.*,  
24 281 U.S. at 560 (citing evidence that company union “report[ed]” its progress to carrier) *with*  
25 6/7/07 Tr. 234:14–235:13, 6/8/07 Tr. 9:4–7, 13:19–25, 22:23–23:8, 54:19–23, 118:20–23; Plfs.’  
Exh. 13.

26 (12) SkyWest is anti-union and has expressed its anti-union views to all employees, and  
27 SAPA representatives have made anti-ALPA statements in new hire classes and in  
correspondence with pilots. *Compare Link-Belt Co.*, 311 U.S. at 588 (employer’s anti-union  
28 “attitude” is “relevant”); *Lawson Co.*, 753 F.2d at 477 (evidence that employer “exhibited an  
anti-union animus”); *Utrad*, 454 F.2d at 522 (employer had “antiunion bias”) *with* 6/7/07 Tr.  
29 15:21–16:22, 21:3–24:14, 108:9–10, 242:15–24, 244:1–245:12, 253:16–254:2; 6/8/07 Tr.  
30 61:19–23, 120:11–123:3; Plfs.’ Exhs. 3, 4.

31 (13) SkyWest has intimidated ALPA supporters by threatening them with discipline

<sup>8</sup>(...continued)

25 (continued)  
26 *Dennison Mfg. Co.*, 168 NLRB 1012 (employee committee could not function without use of  
27 employer's premises for meetings and elections and depended on employer for supplies, stationery  
28 and secretarial services); 6/7/07 Tr. 29:10–30:16, 43:15–45:20, 59:18–60:12, 63:7–69:6, 70:1–72:1,  
75:1–75:25, 85:10–86:6, 98:16–99:6, 110:7–112:8, 112:10–115:18, 154:14–158:25, 170:4–24,  
190:4–191:17, 192:25–199:5, 236:10–238:20, 238:22–239:6; 6/8/07 Tr. 85:1–10, 91:12–14; Plfs.'  
Exh. 15.

1 for wearing ALPA lanyards and by refusing to promote an ALPA supporter because of his union  
 2 politics. *Compare Link-Belt*, 311 U.S. at 589–90 (employer discriminated against supporters  
 3 of independent union and only belatedly instructed supervisory personnel not to “take sides”);  
*Texas & N.O.R. Co.*, 281 U.S. at 560 (discriminated against supporters of independent union);  
*Caldor Inc.*, 319 NLRB 728 (1995) (company threatened employee for failing to support  
 4 particular union) *with 6/7/07 Tr. 15:3–14, 26:11–27:15, 45:21–46:2, 51:1–24, 72:2–5,  
 116:1–123:18, 130:9–15, 142:7–22, 150:6–154:13, 158:8–160:16, 168:12–23, 169:25–170:3,  
 179:3–25, 245:9–17; Plfs.’ Exh. 10.*

5 (14) SkyWest “bargains” with SAPA. *Compare cases cited supra p.4 & n.5 with 6/7/07 Tr.  
 6 29:10–30:16, 6/8/07 Tr. 28:2–7, 29:3–6.*

7 (15) SkyWest retains complete control over the terms of the parties’ purported “contract,” is free to  
 8 make “unwritten” changes to that “contract,” and retains complete authority over disciplinary  
 9 decisions and all employee grievances. *Compare Newport News*, 308 U.S. at 245 (provision  
 10 for arbitration “was to become operative only upon concurrence of the [employer’s] president”);  
*Penn. Greyhound*, 303 U.S. at 269 (grievances were to be taken up by committee with equal  
 11 number of employee and management representatives and review could not be secured without  
 12 management approval); *Dennison Mfg.*, 168 NLRB 1012 (“no decisions . . . can be made  
 13 without management approval”) *with 6/7/07 Tr. 31:18–26, 33:9–35:15, 36:12–37:5, 39:19–42:3,  
 14 88:23–89:5, 229:6–19, 231:15–234:17, 235:20–236:9; 6/8/07 Tr. 53:9–11, 54:11–18,  
 15 88:5–89:13, 110:10–19, 119:23–25; Plfs.’ Exhs. 1, 2, 14.*

16 This overwhelming and uncontested evidence is more than sufficient to establish unlawful  
 17 employer assistance, particularly on a preliminary injunction motion. The Supreme Court has found  
 18 unlawful employer assistance on facts much less egregious. *See, e.g., Newport News*, 308 U.S. at 248  
 19 (employee “committee” in question successfully resolved disputes with management; “overwhelming  
 20 majorities” of employees participated in elections for committee representatives; company *never*  
 21 objected to employees’ forming independent union; company did not discriminate against support for  
 22 outside unions; no company officials or superiors exercise any influence regarding election of  
 23 representatives; and employees voted by secret ballot to continue committee representation); *see also*  
*Utrad*, 454 F.2d at 522–23 (employer funded employee association; provided assistance in form of  
 24 space, supplies, and materials; engaged in bargaining; association “revitaliz[ed]” contemporaneously  
 25 with union campaign; supervisors permitted to participate).

26 The Ninth Circuit has also made clear that the RLA’s prohibition against unlawful employer  
 27 assistance is violated not only when a carrier completely dominates the company union, but even when  
 28 it provides “assistance [to] one union faction over another.” *Konop*, 302 F.3d at 885 (plaintiff claim  
 that carrier disclosed contents of his union organizing-related website to rival incumbent union should

1 have survived summary judgment).<sup>9</sup>

2 **II. PLAINTIFFS' PROPOSED RELIEF REMEDIES THE HARMFUL EFFECTS OF  
DEFENDANT'S UNLAWFUL SUPPORT OF SAPA.**

3 As discussed above, Congress and the Courts have long recognized that employer support for  
4 company unions is inherently coercive of employee free choice. Paragraphs 3 and 4 of Plaintiffs'  
5 proposed preliminary injunction remedy the harm that has been inflicted on pilots' free choice through  
6 SkyWest's unlawful support for SAPA. Absent the relief provided for in these paragraphs, the  
7 destructive effects of SkyWest's support for this "company union" would be left completely unremedied  
8 pending resolution of the ultimate merits of this case. Such a result flies in the face of controlling Ninth  
9 Circuit caselaw, which holds that "coercive and inhibitory effects upon the employees' organizational  
10 rights secured by the RLA" are "irreparable," and thus necessitate preliminary injunctive relief.  
11 *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 938 (9th Cir. 1987).<sup>10</sup>

12 Where, as here, the harm consists of an employer's unlawful support of a "company union," the  
13 only appropriate remedy is an order prohibiting the employer from providing further financial support  
14 and discriminatory access to the company union, and also requiring the employer to provide the  
15 independent union with the same access to employees that the employer has already unlawfully  
16

---

17 <sup>9</sup> SkyWest will likely renew its argument that its support for SAPA is permissible as a new  
18 "forward-thinking" model of labor relations. But employer support for preferred unions on such a  
19 massive scale is no less illegal now than it was 70 years ago, when the RLA and NLRA were  
20 passed, as cases like *Konop*, 302 F.3d at 872–73, and *Midwestern Personnel*, 322 F.3d at 977–78,  
21 demonstrate. Moreover, the *Barthelemy v. ALPA*, 897 F.2d 999 (9th Cir. 1990), case cited by  
22 SkyWest in opposition to Plaintiffs' Motion for Preliminary Injunction is easily distinguishable for  
23 the reasons given in Plaintiffs' Corrected Reply at 22. *Hertzka & Knowles v. NLRB*, 503 F.2d 625  
24 (9th Cir. 1974), is similarly distinguishable. The key facts considered significant by the Ninth  
25 Circuit in that case were that the company's *employees* voted "overwhelmingly" to establish a  
26 committee system and to include management representatives on some of the committees. *Id.* at  
629–31. Here, by contrast, SkyWest's employees have never voted to have SAPA as their  
bargaining representative, are forced to join and not permitted to reject membership, and have never  
been asked to approve Mr. Eisenstat's classification as a member of management. See (1), (2), (10),  
(11) *supra*. In addition, SkyWest provides SAPA all of the additional assistance cited above that  
was not present in *Hertzka*.

27 <sup>10</sup> Plaintiffs do not address in this brief paragraphs 1 and 2 of their Proposed Preliminary  
Injunction, which protect their right to engage in expressive and associational activity. For the  
28 reasons stated in their briefs in support of the preliminary injunction motion, such relief is plainly  
necessary to remedy the chilling effect of Defendant's conduct.

1 provided to its preferred entity. Such relief is far more modest than the remedy ordinarily imposed in  
 2 company union cases, is squarely in line with the plain statutory text and relevant precedent, and is “the  
 3 only effective way of wiping the slate clean and affording the employee[e]s an opportunity to start afresh  
 4 in organizing for the adjustment of their relations with the employer.” *Newport News*, 308 U.S. at 250.

5       **A. THE SUPREME COURT HAS HELD THE EXTREME REMEDY OF**  
 6       **DISESTABLISHMENT NECESSARY AND APPROPRIATE TO REMEDY THE**  
      **UNIQUELY HARMFUL EFFECTS OF COMPANY UNIONISM.**

7           The Supreme Court has held that the appropriate remedy for a carrier’s unlawful support of a  
 8 “company union” is an injunction requiring “disestablishment” of that entity – a remedy far more radical  
 9 than the request for injunctive relief sought here, but necessary to remedy the harmful effects of  
 10 company unionism. An order requiring disestablishment – while fully appropriate in company union  
 11 cases of this sort – is not being sought here. Rather, Plaintiffs seek a remedy from this Court that is far  
 12 more modest, and that does not intrude even permissively on the NMB’s authority to certify bargaining  
 13 representatives – namely, a preliminary injunction that simply protects the integrity of the organizing  
 14 process by eliminating future employer interference and remedying the harmful effects of past employer  
 15 interference.

16           In *Texas & N.O.R., supra*, a case in which an employer had interfered with employees’ free  
 17 choice rights through its support for a company union, the Supreme Court upheld an injunction under  
 18 the RLA that restrained the employer from interfering with employees’ free choice rights and  
 19 specifically required the company to “disestablish” the company union. *Id.* at 557; *see also Virginian*,  
 20 300 U.S. at 543–44, 549–52 (affirming injunction that prohibited carrier from “fostering . . . the  
 21 company union” and giving great weight to Congress’ recognition that company unions exert a  
 22 “coercive influence” and constitute an “obstruction” to employee free choice); *see also Pennsylvania*  
 23 *Greyhound Lines*, 303 U.S. at 263-64 (approving disestablishment of company union under NLRA);  
 24 *Holtville*, 148 F.2d at 169-70 (same); *Idaho Refining Co.*, 143 F.2d at 246 (same).<sup>11</sup>

---

25  
 26       <sup>11</sup> SkyWest contends that *Virginian Railway* is distinguishable because the employer’s  
 27 illegal activities in that case followed an NMB certification. But there is no support in *Virginian*  
 28 *Railway* for limiting its holding or analysis to the post-certification context. To the contrary, the  
      Ninth Circuit has squarely held that judicial enforcement of employees’ RLA rights is particularly  
      (continued...)

1 Disestablishment orders are necessary to remedy the uniquely harmful effects of company  
2 unions. In *Newport News*, the Supreme Court affirmed a disestablishment order even in a case where  
3 a “sweeping majority” of employees had voted for the company union. 308 U.S. at 248; *see also Falk*,  
4 308 U.S. at 459, 461 (because employer had used company union “as a convenient weapon to prevent  
5 the exercise of its employees’ rights to self-organization and collective bargaining,” the company union  
6 “could not emancipate itself from habitual subservience” it created and “in order to insure employees  
7 that complete freedom of choice . . . must be completely disestablished and kept off the ballot”); *Idaho*  
8 *Refining*, 143 F.2d 246 (enforcing disestablishment order even though majority of employees had voted  
9 for entity: “where an organization has existed for ten years . . . the effects of the long practice cannot  
10 be eliminated and the employees rendered entirely free to act upon their own initiative without the  
11 complete disestablishment of” the company union) (quoting *Newport News*, 308 U.S. at 250).

**B. THE RELIEF SOUGHT BY PLAINTIFFS IN PARAGRAPHS 3 AND 4 IS NECESSARY TO REMEDY THE HARMFUL EFEFCTS OF SKYWEST'S UNLAWFUL CONDUCT AND FAR MORE MODEST THAN THE REMEDY OF DISESTABLISHMENT.**

**1. AN ORDER PROHIBITING SKYWEST FROM FUNDING SAPA IS  
COMMANDED BY SECTION 2, FOURTH.**

16 Plaintiffs seek an order prohibiting SkyWest from funding or providing further financial support  
17 to SAPA. (Pltfs' Rev. Prop. Prel. Inj. at ¶4.) Such an order directly implements the express statutory  
18 prohibition in Section 2, Fourth, against a carrier contributing its funds to any labor organization. 45  
19 U.S.C. §152, Fourth.

20 This remedy is also far less intrusive than the remedy of disestablishment, which is ordinarily  
21 imposed in a company union case such as this. *See Texas & N.O.R.*, 281 U.S. at 560. Although  
22 Plaintiffs are entitled to disestablishment of SAPA on these facts, Plaintiffs do not seek an order

1 requiring SkyWest to withdraw recognition from SAPA or to cease dealing with SAPA.<sup>12</sup> Plaintiffs do  
 2 not seek to invalidate the Crewmember Policy Manual to which SkyWest and SAPA are parties.<sup>13</sup> Nor  
 3 do Plaintiffs seek any kind of order prohibiting SAPA from continuing in existence.<sup>14</sup> Plaintiffs merely  
 4 seek to enforce their express statutory right to be free of employer interference with their right to  
 5 organize, and in particular, that SkyWest not contribute any funds to SAPA. 45 U.S.C. §152, Fourth.

6                   **2. SKYWEST'S UNLAWFUL PROVISION OF DISCRIMINATORY  
 7 ACCESS TO SAPA REQUIRES AN ORDER PROHIBITING FUTURE  
 DISCRIMINATION AND REQUIRING EQUAL ACCESS.**

8                  The relief sought by Plaintiffs in Paragraph 3 is squarely in line with precedent on unlawful  
 9 employer assistance, and, like paragraph 4, is far less intrusive than the remedy of disestablishment.

10                 The prohibition against employer support for a union is violated not only when an employer  
 11 completely dominates the entity, but even where it simply provides one union over another preferred  
 12 access to employees. *See, e.g., Duane Reade, Inc.*, 338 NLRB at 945; *Katz's Deli*, 316 NLRB 318, 333  
 13 (1995); *Ella Indus.*, Inc., 295 NLRB 976, 979-80 (1989); *Castaways Management*, 285 NLRB 954, 959,  
 14 974 (1987); *see also Konop*, 302 F.3d at 885 (employer “assisted one union faction over another”).

15                 The appropriate remedy in such cases is an injunction prohibiting discriminatory access and  
 16 requiring the employer to provide the excluded union with the same access previously granted to its  
 17 preferred union. *See, e.g., San Manuel Indian Bingo and Casino*, 345 NLRB No. 79, Order at ¶¶1a, 2a

---

19                 <sup>12</sup> “Disestablishment” entails a complete prohibition against current and future dealings  
 20 between the employer and the company union. Thus, a disestablishment order may prohibit the  
 entity appearing on the ballot in a future representation election. *Falk*, 308 U.S. at 461.

21                 <sup>13</sup> An order prohibiting the company from funding SAPA has no legal effect on the  
 22 enforceability, such as it is, of the Crewmember Policy Manual, *contra Am. Opp. to Prel. Inj.* at 12,  
 23 which, in any event, may already be overridden by the company at its sole discretion, *see Plfs.' Exhs.* 1, 2. Further, where, as here, a disestablishment order runs solely against the employer, it  
 24 may properly be entered without even providing notice and a hearing to the company union. *See Penn. Greyhound*, 303 U.S. at 271 (“As the order did not run against the Association, it is not  
 25 entitled to notice and hearing”). In any event, SAPA is fully on notice of these proceedings. Two of  
 26 its Executive Board members testified at the hearing. 6/8/07 Tr. at 6 (Eisenstat, SAPA Secretary);  
*id.* at 118 (Nolin, SAPA President).

27                 <sup>14</sup> Under the relief Plaintiffs seek, and to which they are entitled, SAPA would be free to  
 28 support its activities in the same manner as any bona fide union – through a combination of  
 volunteer work and union dues.

1 (2005) (prohibiting employer from denying union “access to its property, facility, and employees on an  
 2 equal and equivalent basis [as provided to other union]” and requiring it to provide, on request, “the  
 3 same rights of access to its property, facility, and employees on an equal and equivalent basis”); *Kosher*  
 4 *Plaza Supermarket*, 313 NLRB 74, Order at ¶¶1d, 2(e) (1993) (prohibiting employer from “denying  
 5 [union] representatives” the “same rights and access [as provided to other union] to meet with . . .  
 6 employees on worktime and on its premises” and requiring it to provide, on request, access to “premises  
 7 to meet with employees during worktime as it had previously granted [other union]”).<sup>15</sup>

8 Contrary to Defendant’s representation, there is nothing unprecedented about a remedy of  
 9 access.<sup>16</sup> As the D.C. Circuit has explained, “the critical inquiry is whether the employer conduct is of  
 10 such a nature that access is needed to offset harmful effects that have been produced by that conduct.  
 11 If union access is needed to dissipate those effects, access may be granted even though the union has  
 12 alternative means of communicating with employees.” *United Steelworkers of America v. NLRB*, 646  
 13 F.2d 616, 638 (D.C. Cir. 1981) (enf’g in part, remanding in part NLRB order).<sup>17</sup>

14 Defendant also contends that SAPA does not use its preferred access to engage in any  
 15

16 <sup>15</sup> See also *Regal Recycling*, 329 NLRB 355, 357 n.15 (1999) (noting propriety of order  
 17 requiring employer “to grant Local 813 and its representatives reasonable access to the [employer’s]  
 18 bulletin boards and all places where notices to employees are customarily posted” and “to its facility  
 19 in nonwork areas during employees’ nonworktime”; such a remedy “carefully tailored” to  
 20 employer’s unlawful denial to one union of access to employees and facility, where such access  
 21 provided to other union); *Simmons Indus., Inc.*, 321 NLRB 228, 229 Order at ¶¶1h, 2d (1996)  
 22 (prohibiting employer from “[s]electively and disparately enforcing a rule regulating public access  
 23 to . . . employees’ breakroom” and requiring employer to “[a]llow access by the Union’s  
 24 representatives to . . . employee breakroom to the same extent and manner permitted other  
 25 nonemployee visitors and solicitors”).

26 <sup>16</sup> The Circuit Courts have upheld NLRB orders requiring an employer to provide a union  
 27 seeking to organize with extensive access, even where the unlawful conduct did not involve  
 28 discriminatory provision of access to one union over another. See, e.g., *Fieldcrest Cannon, Inc. v.*  
*NLRB*, 97 F.3d 65 (4th Cir. 1996); *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952 (2d Cir. 1988).

26 <sup>17</sup> The cases cited herein order access to an outside union and not to the employer’s own  
 27 employees. Access rules governing unions are actually much more strict than those governing  
 28 employees. \*\*The access Plaintiffs seek is only for specified OC members, all of whom are  
 SkyWest employees. Rev. Prop. Prel. Inj. at ¶3. Because the proposed relief satisfies the higher  
 standard for outside unions, Plaintiffs are plainly entitled it.

1 “campaigning” activity. This contention is meritless for three reasons.

2 First, the prohibition against discriminatory access applies even when the union with preferred  
 3 access is engaging in speech related to its so-called “representational” duties, and not in any explicit  
 4 campaign activity. In *Katz’s Deli*, for example, the prohibited discriminatory access consisted of one  
 5 union’s discussions with workers on the premises “pertaining to the negotiation of the agreement” it  
 6 had just entered into with the employer. 316 NLRB at 324. Even assuming that SAPA used its special  
 7 access to company email and training sessions for new hires exclusively to discuss the “representation”  
 8 it provides SkyWest pilots, SkyWest’s refusal to provide Plaintiffs with equal access is unlawful and  
 9 must be remedied. *Id.* at 333.

10 Second, as a factual matter, SAPA does use its preferred access to “campaign.” The SAPA  
 11 representative who makes presentations to newly hired pilots has by his own admission made negative  
 12 comments about ALPA. *See* 6/8/07 Tr. at 121–22. SAPA has used its “group email” capability to send  
 13 emails to the entire pilot group that attacks communications sent by Plaintiff OC as “misleading and  
 14 requir[ing] a direct response.” Martirano Decl. Exh. 1. In addition, it is undisputed that SAPA uses the  
 15 company email system in connection with regular election campaigns to elect SAPA representatives.  
 16 *See* 6/7/07 Tr. at 237–38.

17 Third, and most fundamentally, even if it were true that SAPA had engaged in little overt  
 18 campaigning, that would only *underscore* the need for the remedy sought by Plaintiffs. SAPA does not  
 19 need to campaign because SkyWest has unlawfully “recognized” it without ever requiring SAPA to  
 20 show majority support. *See* cases cited *supra* pp.3–5. To permit SkyWest to continue to provide  
 21 discriminatory access to SAPA would allow the company to profit from its unlawful conduct in  
 22 “recognizing” SAPA, and obviating the need for SAPA to “campaign,” as truly representative unions  
 23 are required to do. Equally to the point, SkyWest’s support of SAPA is by its nature campaign activity  
 24 against independent union representation because it allows SkyWest to create “the mistaken belief that  
 25 [SAPA] was truly representative and afforded an agency for collective bargaining,” and thus “to prevent  
 26 self-organization” by the SkyWest pilot group. *Penn. Greyhound*, 303 U.S. at 271. SkyWest has  
 27 intentionally used its support of SAPA “as a convenient weapon to prevent the exercise of its  
 28 employees’ rights to self-organization and collective bargaining.” *Falk Corp.*, 308 U.S. at 461.

1 Plaintiffs are entitled to a remedy that redresses the harm inflicted by that weapon.

The remedy sought – a preliminary injunction prohibiting SkyWest from providing discriminatory access and requiring it to provide access to the same channels previously provided to SAPA – is well within the main of relief ordered in unequal access cases. *See, e.g., San Manuel Indian Bingo and Casino*, 345 NLRB No. 79, Order at ¶¶1a, 2a; *Kosher Plaza Supermarket*, 313 NLRB 74, Order at ¶¶1d, 2(e); *see also Green v. County School Bd. of New Kent*, 391 U.S. 430, 438 (1968) (“the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future”). It is also far more modest than the remedy of “disestablishment” often imposed in cases such as this involving company unions. Requiring SkyWest to provide members of Plaintiff OC with access to company email and newly hired pilot classes is “the only effective way of wiping the slate clean and affording the employe[e]s an opportunity to start afresh in organizing.” *Newport News*, 308 U.S. at 250. Congress and the courts have long recognized the inherently destructive effect on employee free choice of company unions. Providing comparable “access is needed to offset [those] harmful effects.” *United Steelworkers of America*, 646 F.2d at 638.<sup>18</sup>

16 III. ABSENT PRELIMINARY INJUNCTIVE RELIEF, PLAINTIFFS' RIGHT TO BE FREE  
17 OF THE COERCIVE EFFECTS OF SKYWEST'S SUPPORT FOR SAPA WILL BE  
IRREPARABLY LOST.

18 The relief Plaintiffs seek from the coercive effects of SkyWest's support of SAPA must be  
19 granted as part of the preliminary injunction or the RLA-protected right of SkyWest pilots to exercise  
20 free choice, without employer interference, will be forever, irreparably lost.

21 Paragraphs 3 and 4 of Plaintiffs' proposed preliminary injunction remedy the harm that SkyWest  
22 has inflicted on pilots' right to free choice through SkyWest's unlawful support of SAPA. As the  
23 Supreme Court has explained, company unions exert an inherently coercive effect on employee free

<sup>18</sup> Although there is ample precedent for an order requiring SkyWest to provide members of Plaintiff OC with remedial access, there can be no doubt that, at a minimum, a preliminary injunction prohibiting SkyWest from discriminating between SAPA and members of Plaintiff OC with regard to access is required in this case. See, e.g., *Duane Reade, Inc.*, 338 NLRB at 945; *Katz's Deli*, 316 NLRB at 333; *Ella Indus., Inc.*, 295 NLRB at 979-80 ; *Castaways Management*, 285 NLRB at 959, 974.

1 choice by creating the “mistaken belief” that employees do not need independent representation. *Penn.*  
 2 *Greyhound*, 303 U.S. at 271. It is also well-established that “coercive and inhibitory effects upon the  
 3 employees’ organizational rights secured by the RLA” are “irreparable,” and thus demand preliminary  
 4 injunctive relief. *Arcamuzi*, 819 F.2d at 938.

5 A preliminary injunction providing only the relief in paragraphs 1 and 2 of Plaintiffs’ proposed  
 6 preliminary injunction, while safeguarding important expressive and associational rights, would do  
 7 nothing to address the harmful effects stemming from SkyWest’s unlawful support of SAPA. Where,  
 8 as here, Plaintiffs have an overwhelming likelihood of success on their claims of unlawful employer  
 9 support, *see supra* Part I-B, preliminary injunctive relief is necessary to guard against the “irreparable”  
 10 harm to their “organizational rights” based on SkyWest’s “coercive and inhibitory” conduct. *Arcamuzi*,  
 11 819 F.2d at 938.

12 The harm at issue here is particularly time sensitive because Plaintiffs are engaged in an  
 13 organizing campaign. Absent the relief provided for in Paragraphs 3 and 4, SkyWest will continue to  
 14 utilize the “convenient weapon” of SAPA “to prevent the exercise of its employees’ rights to self-  
 15 organization and collective bargaining.” *Falk*, 308 U.S. at 461. Deferral of relief on the company union  
 16 issues until a final judgment on the merits would thus amount to *denial* of relief. *See, e.g., Scott ex rel.*  
 17 *NLRB v. Stephen Dunn & Assocs.*, 241 F.3d 652, 667 (9th Cir. 2001) (“The value of the right to enjoy  
 18 the benefits of union representation is immeasurable in dollar terms once it is delayed or lost.”); *Brown*  
 19 *v. Pac. Tel. & Telegraph Co.*, 218 F.2d 542, 544 (9th Cir. 1955) (“drifting away” of supporters from  
 20 union “to the union favored by the employers” constitutes irreparable harm).

21 Plaintiffs’ right to organize, free of the coercive effect of SkyWest’s support of SAPA, is as  
 22 precious, and perishable, as the expressive and associational rights for which preliminary injunctive  
 23 relief is unquestionably appropriate. *Cf., e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) (First  
 24 Amendment). Indeed, the Supreme Court has made clear that extreme remedies (such as  
 25 disestablishment) are necessary in company union cases to “afford[] the employe[e]s an opportunity to  
 26 start afresh in organizing” and “to insure employees that complete freedom of choice guaranteed” by  
 27 statute. *Newport News*, 308 U.S. at 250; *Falk*, 308 U.S. at 461. To deny preliminary injunctive relief  
 28 on Plaintiffs’ SAPA claims – and thereby permit SkyWest “to prevent self-organization,” *Penn.*

<sup>1</sup> *Greyhound*, 303 U.S. at 271 – would render a nullity the well-established right of employees to organize  
<sup>2</sup> free of employer support for a company union.

Finally, the National Mediation Board’s authority to administer an election in no way negates the irreparability of the harm to Plaintiffs’ free choice right. The NMB has *no authority* to adjudicate violations of the Act. *Horizon Air Indus. v. NMB*, 232 F3d 1126, 1133 (9th Cir. 2000). The NMB may supervise elections, but it cannot even investigate a claim of unlawful employer interference until *after* the election is conducted (absent undefined “extraordinary circumstances”) and the irreparable harm to Plaintiffs’ right to organize has *already* been inflicted. See NMB Rep. Manual §17.0 at 24 (2005).<sup>19</sup> The relief sought here can *only* be granted by this court, and absent such relief, Plaintiffs will have no remedy at all.<sup>20</sup>

## CONCLUSION

12 For the foregoing reasons, the Court should enter Plaintiffs' revised proposed preliminary  
13 injunction.

14 || Dated: June 12, 2007 Respectfully submitted

STEPHEN P. BERZON  
LINDA LYÉ  
CLAIRE P. PRESTEL  
Altshuler Berzon LLP

**ELIZABETH GINSBURG**  
Air Line Pilots Association, International

by: \s\Stephen P. Berzon  
Stephen P. Berzon

## Attorneys for Plaintiffs

<sup>19</sup> Available at [www.nmb.gov/representation/representation-manual.pdf](http://www.nmb.gov/representation/representation-manual.pdf).

<sup>24</sup> Even if the NMB had “concurrent” jurisdiction (which it does not, as even SkyWest’s  
<sup>25</sup> *Delta Airlines* case recognizes), the existence of a separate forum, whether a different court or an  
<sup>26</sup> administrative remedy (*see Patsy v. Bd. of Regents*, 457 U.S. 496 (1982)), has never rendered  
<sup>27</sup> inappropriate the issuance of preliminary injunctive relief by a federal court. Claims for violations  
<sup>28</sup> of federal rights, 42 U.S.C. §1983, for example, are routinely brought in federal court. Despite  
concurrent state court jurisdiction over such claims, preliminary injunctive relief is regularly issued  
so long as plaintiffs satisfy the requirements for such relief, which Plaintiffs in this case plainly do.